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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. CAIN, CHARLES F. BENDA and EMIL CONDE,

Petitioners,

vs.

MEDTRONIC, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Is it contrary to public policy to enforce a restrictive covenant so as to prohibit a pacemaker salesman from assisting in implant surgery, even though his assistance has been specifically requested by a cardiologist or surgeon?

(2) Does such a prohibition violate a patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it, as guaranteed by the Fifth and Ninth Amendments to the United States Constitution? (*Doe v. Bolton*, 410 U.S. 179, 197 [1973]).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, William C. Cain, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled cause.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals (*infra*, 1a-8a) is noted at 688 F.2d 841 (7th Circuit 1982). The published opinion of the Court of Appeals (*infra*, 1a-31a) incorporates its unpublished opinion and the opinion of the District Court and is unreported at present. The opinion of the District Court (*infra*, 9a-26a) is not reported.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on July 13, 1982. A timely petition for rehearing was denied on September 2, 1982 (*infra*, 32a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

STATEMENT OF THE CASE

Medtronic, Inc. (hereinafter referred to as "Medtronic") is the world's largest manufacturer of ventricular and atrial pacemakers. The three petitioners, William C. Cain, Charles F. Benda, and Emil Conde, began working for Medtronic as pacemaker salesmen at various times during 1977. Their employment was on an at will basis. None had worked as a pacemaker salesman previously. All received training from Medtronic in the workings of pacemakers and in the manner of their implantation into the human body. Among their studies were physiology and electrophysiology. Within a few weeks each petitioner was covering the Chicagoland territory assigned to him, calling on various cardiologists and surgeons, and assisting in implant surgeries.

The implantation of cardiac pacemakers is performed in a hospital operating room. The pacemaker is a device consisting of a post generator which contains the power source to generate electrical charges, and an electrode or lead, which conducts these electrical pulses to the heart. Patients with chronic heart conductive disorders normally have the artificial pacemaker implanted in their bodies just under the skin. Operating personnel normally present are a surgeon, an anesthesiologist, a surgical assistant, a scrub nurse, a circulating nurse, an x-ray technician, and the pacemaker salesman. Often a cardiologist is also present.

The surgeon relies on the salesman to take special measurements when a pacemaker is implanted to determine whether it is going to function effectively in the patient. It is the job of the salesman to determine if the electrode wire of the pacemaker is properly connected

to viable heart tissue which is suitable for long-term pacing. This is done by means of fluoroscope images and various electrical instruments whereby the salesman can determine the stimulation and sensing thresholds of a given area of the heart. After the salesman determines that the electrode is properly connected to the heart, and the surgeon concurs, the surgeon implants the pacemaker.

Nor is the surgeon's reliance on the salesman always limited to the above functions. Some patients suffer from recurrent tachycardias, or rapid beating of the heart. These rapid heart rhythms are potentially life-threatening and can be triggered during a pacemaker implant, resulting in cardiac arrest. When a pacemaker is implanted in a patient with such a problem it is frequently necessary to position the electrode to a precise place inside the heart and to program the pacemaker to unusual functions. The salesman's assistance to the surgeon and the cardiologist under such circumstances is very important.

Though it seldom happens, the implantation of a pacemaker can result in the development of shock in a patient, or even death itself. Pacemaker patients are frequently elderly persons who require careful medical attention. Their average age is 68 years.

The petitioners are on call twenty-four hours a day, seven days a week, as it is often necessary to implant pacemakers on short notice. Since 1977 each petitioner has assisted at over one thousand surgeries. In addition to assisting at surgery, the salesmen are often called upon by cardiologists and surgeons to give advice concerning the pacing needs of particular patients, and the appropriate pacemakers for such patients. The salesmen are also frequently consulted by the doctors regarding

technological advances in the pacemaker field which are occurring constantly. The level of expertise of a salesman is an important factor in a physician's decision to call on him for technical advice and for assistance in surgery. Not all salesmen possess the same level of expertise.

A salesman is not compensated for assistance in surgery as such. Rather his income is related to the number of pacemakers sold to the hospital accounts to which he is assigned. If a physician wants to use the services of a salesman in surgery, he will ordinarily implant the pacemaker of the salesman's company.

Each petitioner was an excellent salesman for Medtronic, doubling Medtronic's share of the market in his respective territory. In late August or early September, 1981, each petitioner resigned from Medtronic and became an independent sales representative with a competitor, Intermedics, Inc.

Immediately upon his resignation Medtronic sued each petitioner for injunctive relief based on identical restrictive covenants which the petitioners had signed in 1977. The covenant states as follows:

> "For 360 days after termination of my employment with the Company, I will not attempt to divert any Company business by soliciting, contacting, or communicating with any customers for the Company's products with whom I, or employees under my supervision, had contact during the year preceding termination of my employment."

In late September, 1981, Medtronic dismissed its complaints for injunctive relief and filed amended ones asking for declaratory relief. On October 29, 1981, shortly before trial, Medtronic amended its complaint for declaratory judgment so as to request injunctive relief as

well. At that time Medtronic asked that each petitioner be enjoined from soliciting, contacting or communicating with any customers of Medtronic located in his former Medtronic sales territory, and specifically those hospitals in his former territory and all physicians and surgeons associated with those hospitals with whom the petitioner had contact during the year preceding termination of petitioner's employment. Cain's answer to Medtronic's complaint stated that the restrictive covenant was invalid.

During October and early November of 1981 Cain assisted in ten surgeries in his former territory, each at the specific request of the attending surgeon. And Benda assisted in eighteen surgeries at surgeons' requests in his former territory. Medtronic contended that a petitioner's assistance at such a surgery was a violation of the restrictive covenant. The petitioners argued that the covenant did not extend to surgeries attended at the specific request of a surgeon.

On November 10, 1981, the second day of the trial, the District Judge entered an order restraining each petitioner in the territory in which he was formerly employed from attempting to divert any Medtronic business by soliciting, contacting or communicating with any customer for Medtronic's products with whom the petitioner had contact during the year preceding termination of his employment. For purposes of the restraining order the word customer included physicians.

Later in the trial the petitioners put on two medical witnesses, Dr. Richard Kehoe, a cardiologist at Northwestern Memorial Hospital, Chicago, Illinois, and Dr. Andrew Carney, a surgeon at Oak Park Hospital, Oak Park, Illinois. Both testified about the nature of implant surgery and special problems associated with it. Dr.

Kehoe, who had worked with Cain since 1979, stated that Cain was the person to whom he primarily looked for expertise concerning heart pacing problems. Dr. Carney, who had worked with Benda since 1977, testified as to Benda's high level of competence in assisting him in implant surgery. He said that he wanted Benda to assist him whenever he implanted a pacemaker. Dr. Kehoe likewise stated that he wanted continued access to Cain, an access that he believed had been significantly impaired by virtue of Medtronic's suit.[1]

At the conclusion of the trial the District Judge continued the temporary restraining order in effect pending decision. However, he allowed each petitioner to assist in emergency surgeries in his former territory. He further directed that each emergency be reported to Medtronic's counsel within twenty-four hours.

On December 17, 1981 Cain moved the District Court to modify its preliminary injunction to (1) allow him to attend an upcoming surgery of Dr. Kehoe's, and (2) allow him to assist in any surgery where a cardiologist or surgeon insisted on his attendance. The District Court denied this motion and Cain appealed. On January 21, 1982 the Seventh Circuit Court of Appeals modified the preliminary injunction so as to permit Cain to assist in any surgery where a cardiologist or surgeon specifically requested his attendance. The modification was effective for two weeks, subject to a request for renewal. On January 22, 1982 District Judge George N. Leighton extended the terms of the modification to Benda and Conde. During that two-week period the petitioners assisted in more than fifteen surgeries under the terms of the modification order.

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[1] The testimony of Dr. Kehoe and Dr. Carney appears at pp. 537-551 and 650-665 of the trial court transcript.

On February 4, 1982 District Judge Bernard M. Decker entered a permanent injunction against the petitioners whereby each was ordered as follows:

> "not to attempt to divert any Medtronic business by soliciting, contacting or communicating with any customers for Medtronic products, including physicians, with whom he, or employees under his control, had contact during the year preceding his resignation from Medtronic." (App. 26a)

In his accompanying memorandum opinion the District Judge specified that attendance at surgeries in a petitioner's former territory was prohibited (App. 26a, 22a). No exceptions were made for situations where a physician specifically requested a salesman's assistance in surgery. Nor did the opinion discuss the petitioners' contention that to prohibit such assistance in surgery violated public policy. The District Court simply stated that to protect the public interest medical emergencies were excluded from otherwise prohibited contacts (App. 23a). The injunctions on the petitioners expired on different dates in late August, 1982 (App. 25a, 26a). The petitioners appealed.

Pending appeal the petitioners moved the District Court to modify its permanent injunction to allow each petitioner to assist in any surgery where a cardiologist or surgeon specifically requested his attendance. The District Court denied this motion. The petitioners renewed this motion before the Seventh Circuit Court of Appeals. Various cardiologists and surgeons in the Chicago area filed an amicus memorandum in support of the petitioners' requested modification. On March 4, 1982 the Court of Appeals denied the modification.

The appeal was briefed and argued.[2] On July 13, 1982 the Court of Appeals affirmed the District Court's decision. The Court held that the public interest was not significantly harmed by enforcing the covenant, as other salesmen could serve the needs previously served by the petitioners (App. 6a-8a). Cain petitioned for a rehearing, with a suggestion for a rehearing *en banc*. That petition was denied on September 2, 1982 (App. 32a). Cain then requested that the Court of Appeals stay its mandate pending the filing of a petition for writ of certiorari in this Court. The Court of Appeals denied this request and its mandate issued on September 9, 1982.

On October 13, 1982 Medtronic filed a motion before District Judge Bernard M. Decker asking leave to file an amended and supplemental complaint seeking damages in excess of two million dollars against each of the petitioners. This new complaint is based on the same facts involved in the instant case. The petitioners have opposed this motion and the matter is presently being briefed.

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[2] On March 24, 1982 the Court of Appeals denied the request of the amici heart surgeons to file a brief in support of the petitioners.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Seventh Circuit has decided an important question of Federal law which, has not been, but should be, settled by this Court, namely: Is it contrary to public policy to enforce a restrictive covenant so as to prohibit a pacemaker salesman from assisting in implant surgery, even though his assistance has been specifically requested by a cardiologist or surgeon?

A related question is also presented, namely: Does such a prohibition violate a patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it, as guaranteed by the Fifth and Ninth Amendments to the United States Constitution? (See *Doe v. Bolton*, 410 U.S. 179, 197 (1973).)

The public policy question presented here results from the union of high technology and medicine. At stake is the question of whether the physician has the right to select the pacemaker technician he thinks best qualified to assist him in implant surgery, or whether a pacemaker company can veto that choice on the basis of an asserted proprietary interest in the physician. The lower courts have upheld Medtronic's claimed veto power. The petitioners believe that it is contrary to public policy for a pacemaker company or a court to interfere with a physician's judgment in such an important area, and one traditionally within the physician's expertise.

Each year approximately 150,000 pacemakers are implanted in the United States. The patients rely on the success of the surgery in order to keep their hearts

functioning properly. The pacemakers are complex devices, with a new "generation" of pacemakers being developed every twelve to eighteen months. The petitioners herein are highly trained and very knowledgeable concerning the operation of pacemakers and the manner of implanting them into the human body. Both sides agree on that. Nor is there any disagreement over the fact that many physicians relied on the expertise of the petitioners not only in surgery but before and after as well. As David Raich, Medtronic's Chicago area sales manager, responded when asked what input the salesman would have that the physician would be looking for:

> A. "In my opinion, by virtue of his (the salesman's) expertise and the total number of implants that he has attended, he probably has more experience than the physician, per se."
>
> "Since, pacing generally represents about two percent of his (the physician's) practice and it represents one hundred percent of our work, he (the salesman) will have that expertise. So, he may have some skills that the physician may not (have) relative to that particular equipment. Relative to that particular question." (Tr. 169, 170).

Thus, the facts in this case clearly show that cardiologists and surgeons rely a good deal on pacemaker salesmen. And it is out of that reliance that important issues of public policy grow.

Before getting into a further discussion of the public policy issue it is best to discuss why this case is not moot, even though the one-year injunction periods have expired. The reasons are twofold. First, the Court of Appeals decision still has important effects on the petitioners. Second, because of the widespread use of restrictive covenants in the pacemaker industry, a deci-

sion herein will have great impact on public health throughout the country.

As to the first reason, Medtronic is presently seeking leave of the District Court to file its amended and supplemental complaint asking in excess of two million dollars in damages against each of the petitioners. This new complaint is based on the same facts litigated in the original trial herein, and its legal theory rests on the Court of Appeals decision herein. A reversal of that decision on the public policy issue would favorably affect the petitioners' situation on matters pending in the District Court.

Furthermore, as to Cain, Medtronic has prosecuted fourteen charges of civil contempt against him relating to claimed violations of the preliminary injunction. Those charges were tried on April 19, 1982 and a decision is being awaited. Most of the fourteen charges concern surgeries which Cain assisted in at the specific request of a cardiologist or surgeon.[3] A decision here on the public policy issue would obviously affect the outcome of the contempt case.

Additionally, Medtronic has filed an ancillary action against Intermedics, Inc. in the District Court for the Southern District of Texas, Houston Division, No. Misc. 82-147, seeking access to Intermedics' records to determine if Cain assisted in any surgeries in his old territory after the entry of the permanent injunction. That matter has also been briefed, and the parties are awaiting the decision of District Judge Norman W. Black. A decision on the public policy issue could also affect that case.

[3] Seven of these charges concern "specific request" surgeries which Cain attended during the two week modification of the preliminary injunction.

But even if none of the above proceedings had occurred, this Court should issue its writ of certiorari in oder to review the public health implications of the decision herein. In *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179, this Court ruled on important constitutional questions concerning the right to abortion and the physician-patient relationship. Both of those cases were held not to be moot even though the pregnancies of both appellants had ended well before this Court ruled. In *Roe v. Wade* at 125, this Court held that "(p)regnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' (citations omitted)." See also *Doe v. Bolton* at 187.

Likewise, a one year injunction period in a restrictive covenant is not long enough "to survive much beyond the trial stage and appellate review (would) be effectively denied." *Roe v. Wade* at 125. Thus, the situation here could also be "capable of repetition, yet evading review." However, because of the nationwide importance of the issues involved and the fact that similar covenants are involved in litigation throughout the country, the public policy issue should not be held moot.

The use of restrictive covenants is widespread throughout the pacemaker industry. The petitioners even had to sign restrictive covenants similar to Medtronic's when they became associated with Intermedics (App. 8a). And Medtronic's argument to the Court of Appeals when it requested publication of the decision herein attests to the national significance of the ruling. Medtronic's motion stated:

> "1. This case is only one of a number of cases around the country in which Medtronic, Inc., has been compelled to resort to the courts for enforcement of its restrictive covenant clause in its em-

ployee agreement. See, for example, *Medtronic, Inc. vs. Gibbons*, 527 F. Supp. 1085 (D. Minn. 1981), quoted by this Court in its opinion."

"2. Publication of an appellate decision affirming the lower Court's issuance of an injunction is of continuing public interest, and could very well contribute to the reduction of future litigation on this same issue."

Since Medtronic has about 40% and Intermedics about 17% of the market in pacemakers, the restrictive covenants of these two companies alone have great national impact.

In order to see the deleterious effects of restrictive covenants in health care one need only look at the facts of this case. After Benda resigned from Medtronic Dr. Carney had need of an A-V Sequential pacemaker for an implant. He called Medtronic and was told by Mr. Raich that Benda had left Medtronic, but Raich promised Dr. Carney that he would personally assist him in the implant. Instead Raich sent a salesman whom Dr. Carney had never met. Dr. Carney was so unsatisfied with that salesman's performance that he told him to leave. An engineer from Medtronic was sent to replace the dismissed salesman and, finally, the pacemaker was implanted. Dr. Carney was so displeased with that experience that he personally contacted Benda and asked him to be available for future implants. Dr. Carney then used Benda's assistance in his subsequent surgeries. (Tr. 657, 658)

After Benda's resignation from Medtronic there was one other instance when Dr. Carney used the assistance in surgery of someone other than Benda. In both of these instances he was unsatisfied with the assistance he received. He believed that the quality of patient care was adversely affected in each instance. The trial judge appeared to concur in this assessment. (Tr. 663, 664)

Dr. Kehoe complained to the trial judge that Medtronic's suit had significantly impaired his accessibility to Cain. This had placed a certain amount of strain on Dr. Kehoe, as Cain was the person he primarily looked to for expertise in the pacing area. If access to Cain was denied him (as it was), he would have to resort to dealing with people in whom he had a lower level of confidence. (Tr. 546, 547)

The problems caused to Dr. Carney and Dr. Kehoe in their medical practices by the enforcement of Medtronic's covenant are indicative of why such a covenant violates the public interest. Simply put, it interferes with a physician's care of his patients in a critical area. Any covenant which does that is not in the public interest. Clearly, such a covenant violates a patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it. See *Doe v. Bolton*, 410 U.S. 179, 197 (1973). The public interest is served by allowing a cardiologist or surgeon unimpeded access to the salesman on whom he has relied for advice and for assistance in surgery for a number of years. The salesman has become a valuable member of the surgical team, a critical part of the physician's care for his patients (Tr. 660).

It is evident from the facts of this case that many of the physicians with whom the petitioners dealt while at Medtronic wanted continued access to the petitioners' services. They were not so much interested in implanting Medtronic pacemakers as they were in having continued use of the petitioners' expertise. If Intermedics' pacemakers now accompanied the petitioners' services, that was fine with these physicians. After all, each company makes good pacemakers. However, by virtue of their resignations, Medtronic had lost the right to the petitioners' services. Yet, ironically, Medtronic used the re-

strictive covenant, to which the physicians were not a party, to prevent those same physicians from using the petitioners' services, to which Medtronic no longer had the right. Surely, such an interference in the physicians' practice of medicine cannot be in the public interest.

The decision in this case is contrary to the principles enunciated in a long line of previous cases. It has not historically been one of the roles of the judiciary to dictate to surgeons whom they can or cannot use for technical assistance in surgery. Courts have hitherto deferred to a physician's judgment in matters concerning the treatment of that physician's patient. As the court stated in *United States v. Vuitch*, 305 F. Supp. 1032, 1034 (D.C. 1969): ". . . the law generally has been careful not to interfere with medical judgment (sic) of competent physicians in treatment of individual patients . . ."[4] See also *Nyberg v. City of Virginia*, 495 F.2d 1342, 1344 (8th Cir. 1974); and *Rosen v. Louisiana State Board of Medical Examiners*, 380 F. Supp. 875, 877 (E.D. La. 1974).

The Seventh Circuit Court of Appeals itself has recognized that governmental bodies should not interfere in the practice of medicine. In *American Medical Assn. v. Weinberger*, 522 F.2d 921, 925 (7th Cir. 1975), the Court upheld the issuance of a preliminary injunction against the enforcement of some H.E.W. regulations, in large part because the regulations may have operated so as to interfere with a physician's medical decisions.

That Court went on to note that if trial of the case showed the regulations to have such an effect that they would (1) be in violation of 42 U.S.C. §1395 (which pro-

[4] This quotation was cited in *United States v. Vuitch*, 402 U.S. 62, 68 (ftn. 3) (1971). However, that case did not turn on this issue.

hibits government action which interferes with the practice of medicine) and (2) perhaps amount to unconstitutional conduct. In reference to the second point that court noted that "[i]n *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), the Supreme Court concluded that requiring approval of a licensed physician's medical decisions violates the constitutional rights of both physicians and patients." *American Medical Assn. v. Weinberger, supra*, at 925. Yet that same Court has here upheld an injunction that prohibits physicians from having the technician, who they deem best qualified, assist them in surgery. Clearly the situation here is at least as much an interference in the practice of medicine as the one in *American Medical Assn. v. Weinberger* was.

The leading case on the constitutional rights involved in the physician-patient relationship is *Doe v. Bolton*, 410 U.S. 179. There this Court held that "[a] woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it [were] substantially limited by . . ." a Georgia statute requiring advance hospital committee approval of the abortion decision, *Id.* at 197.

In that case this Court gave full constitutional protection to the free exercise of a surgeon's "medical judgment", *Id.* at 192. Under Georgia law regulating abortions, a surgeon was limited to considering only three reasons which were set forth in the state abortion statute for recommending an abortion. The district court struck down this limitation allowing physicians to consider "*all* the attendant circumstances", *Id.* at 191. This Court agreed, stating, "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may

relate to health. This allows the attending physician the room he needs to make his best medical judgment." *Id.* at 192. It is just this sort of room which the surgeon needs in choosing his assistants for surgery which is restricted by the injunction herein.

Medical judgments are essentially unreviewable. "It is still true today that '(r)eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he (the physician) possesses the requisite qualifications.'" *Id.* at 200 citing *Dent v. West Virginia*, 129 U.S. 114, 122-123 (1889); see also *United States v. Vuitch*, 402 U.S. at 71. Clearly, if the medical judgment concerning the propriety of an abortion rests with the physician as a matter of constitutional law, then the choice of procedures and personnel (matters which fall even more directly within a surgeon's professional training) are at least equally protected.

Medtronic has previously attempted to distinguish *Doe v. Bolton*, and *American Medical Assn. v. Weinberger, supra*, on the ground that those cases dealt with direct restraints on physicians' medical judgments, whereas the instant case does not (Medtronic's Appellate Brief, p. 27). However, it is clear that the choice of a pacemaker technician to assist in implant surgery is an important one for a surgeon to make.[5] As such it is by definition a medical judgment and, thus, must be left to the surgeon to decide without interference by a pacemaker company or a court.

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[5] Dr. Carney agreed that that choice was a critical part of patient care (Tr. 660).

As this Court said in *United States v. Vuitch*, 402 U.S. 62, 72 (1971):

> "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."

It does not make sense for the courts to entrust the surgeon with the responsibility for surgery, and yet, at the same time veto the surgeon's selection of technical assistance. If the surgeon is going to be relying in some way on the knowledge of a technician, his selection of that technician should be unfettered. Though the injunction herein does not violate the constitutional rights of the petitioners, it clearly violates the constitutional rights of the physicians and patients whom the petitioners serve. For, to paraphrase *Doe v. Bolton*, the patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it are substantially limited by the District Court's injunction, *Id.* at 197. And such a limitation on the practice of medicine must necessarily be contrary to public policy.

The applicability of the constitutional principles enunciated in *Doe v. Bolton* was not discussed by the Court of Appeals here. That Court simply held that the covenant did not violate public policy. It based this holding on three related findings:

> (1) "There is nothing to indicate that the quality of medical care would suffer by enforcement of the restrictive covenant." (App. 6a)
>
> (2) "And while (the petitioners) personal services may be desired and helpful, there is no evidence indicating that services of equal quality and quantity are unavailable." (App. 7a)[6]

[6] There is nothing involved in this case concerning the quantity of salesmen's services. The Court of Appeals' reference to this is puzzling.

> (3) "There is nothing to indicate that needs previously served by the appellants cannot be served by others or that there is a shortage of salespersons possessing the skills and abilities of the appellants." (App. 8a)

There are two problems with these findings. First, they are factual findings which are properly made by the trial court, and not by the Court of Appeals. Second, the evidence adduced at trial contradicts these findings.

Insofar as findings of fact were required to determine (1) whether salesmen possessing skills equal to those of the petitioners were available to physicians in the three territories, and (2) whether the quality of medical care would suffer by enforcement of the restrictive covenant, these findings should have been made by the District Court. However, since the District Court did not even discuss the public policy question (much less make findings concerning it), the Court of Appeals took it upon itself to do so. This was error. As this Court stated in *DeMarco v. United States*, 415 U.S. 449, 450 (1974):

> "Fact finding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court."

See also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ... U.S. ....., 102 S.Ct. 2182, 2190 (1982) and *Pullman-Standard v. Swint*, ... U.S. ....., 102 S.Ct. 1781, 1791 (1982) where this Court cited *Moore's Federal Practice*:

> "See 5A J. Moore, & J. Lucas, Moore's Federal Practice § 52.06[2] (1981) ("Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the

action for appropriate findings to be made");" (Citations omitted)

However, it is the petitioners' position that the interference worked on the practice of medicine by the restrictive covenant here is, as a matter of law, a violation of public policy. Besides, it is clear from the trial testimony that the quality of medical care was adversely affected by enforcement of the covenant. Dr. Carney testified to that effect (Tr. 657-58, 664-65). Likewise, that was the thrust of Dr. Kehoe's testimony (Tr. 544-547).[7] Medtronic put on no testimony contradicting that of either doctor. Furthermore, it is evident that if a physician is deprived of the technician on whom he relied for advice and for assistance in surgery, the quality of medical care that the physician can provide will suffer. Just witness the two surgeries that Dr. Carney had to perform without Benda's assistance. One cannot simply remove a valued member of the surgical team for a year or so, and not have any effect on patient care.

The Court of Appeals' answer to this problem, as noted above, was to find that other equally skilled salesmen were available to the physicians. Not only is there no basis in the record for this finding, but the testimony of the physicians contradicts it. Dr. Kehoe found that some pacemaker salesmen were incapable of even under-

[7] The Court of Appeals also relied on *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1083 (D. Minn. 1981) as support for its decision (App. 6a). However in that case the Plaintiff's motion for a preliminary injunction was decided upon "the verified complaint, the affidavits submitted by the parties, the depositions in the file, and the memoranda and arguments of counsel", *Gibbons* at 1087. There was neither medical testimony nor a trial as was the case here. Nor did *Gibbons* discuss the constitutional issues raised here. Thus, *Gibbons* can hardly be relied on to support the decision herein.

standing the heart pacing problems of his patients (Tr. 544). He stated that in his view Cain was the person with the most expertise in these areas (Tr. 547).

Dr. Carney also testified that the skills of salesmen vary, and that an unskilled salesman would pose dangers to the implant patient (Tr. 659). In Dr. Carney's view some salesmen are trained only in the electronics of implantation and have no skills beyond that (Tr. 656). Dr. Carney trained Brenda in the physiology associated with cardiac output and brain blood flow (Tr. 660-61). He wants Benda to assist him whenever he implants a pacemaker (Tr. 658). He obviously thinks Benda is the most skilled salesman he knows.

Simply as a matter of common experience we know that persons in a particular trade or profession vary in skill, often greatly. The doctors' testimony only confirms the application of this general knowledge to the pacemaker field.

Yet, the Court of Appeals' presumption that equally skilled salesmen are available returns us to the central question of this case, namely, should a court have any role in dictating to a physician whom he may rely on for technical advice or for technical assistance in surgery? Or, do these matters lie solely within the province of the physician? The petitioners strongly contend that only the latter alternative is consistent with the public interest.

Both Dr. Kehoe and Dr. Carney stated that they believed it was their prerogative to select a salesman on whom to rely for assistance (Tr. 545, 660). And they are correct. It is the physician's choice by right, not that of a pacemaker company or a court.

The physician has the responsibility for the success of surgery. And he has the burden of selecting the best personnel available to assist him. His patients are entitled to no less. Since his is the burden, his also is the choice. For, where the responsibility lies, there also lies the right of choice. Indeed, this is a constitutional right.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal law.

CONCLUSION

For the reasons severally and collectively assigned here, it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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December 1, 1982

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-1021 and 82-1212

MEDTRONIC, INC.,

Plaintiff-Appellee,

v.

CHARLES F. BENDA, EMIL CONDE and WILLIAM C. CAIN,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 81 C 5051, 81 C 5029 and 81 C 5030—Bernard Decker and George N. Leighton, *Judges.*

ARGUED JUNE 3, 1982—DECIDED JULY 13, 1982*

Before CUMMINGS, *Chief Judge*, BAUER, *Circuit Judge*, and GRANT, *Senior District Judge.***

GRANT, *Senior District Judge.* This is a consolidated action brought by Medtronic, Inc. ("Medtronic") against the defendants, three former employees, seeking to enforce restrictive covenants contained in employment contracts signed by each. The district court entered a

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* This appeal was originally decided by unreported order on July 13, 1982. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

** Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, sitting by designation.

detailed set of factual findings (Appendix A) which we fully adopt and incorporate herein.

This appeal centers upon the district court's holding that the restrictive covenants in question are valid and enforceable under Illinois law. Each appellant has filed separate briefs raising every conceivable argument "under the sun." The following three arguments constitute the crux of their case.

1. The district court's finding that Medtronic possessed a protectible interest based upon a long-term, near permanent clientele is clearly erroneous.
2. The restrictive covenant is defective in that it contains no geographical limits and the enforcing injunction is vague and overly broad in violation of Fed. R. Civ. P. 65.
3. The injunction entered by the district court is in conflict with the public interest.

We reject these arguments and affirm the decision of the district court for the reasons set forth therein. We add the following discussion in response to the specific arguments noted above.

I.

The district court explicitly stated that the existence of a protectible employer interest in this case was not based upon the appellants' acquisition and possession of confidential information, but upon "Medtronic's long term relationships with its customers." Mem. Op. at 12. The appellants contend this conclusion is clearly erroneous because Medtronic presented no evidence which supports such a conclusion. They further assert that the evidence establishes the opposite; that many hospitals and physicians became Medtronic's customers only after the appellants began employment with Medtronic. Thus, they argue, there were no long-term relationships with whom they would not have come in contact except for their employment with Medtronic.

The standard of review we are bound to apply was recently summarized by the Supreme Court.

> In reviewing the factual findings of the District Court, the Court of Appeals was bound by the "clearly erroneous" standard of Rule 52(a), Federal Rules of Civil Procedure. [cite omitted]. That rule recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence. [cite omitted]. Because of the deference due the trial judge, unless an appellate court is left with the "definite and firm conviction that a mistake has been committed," [cite omitted], it must accept the trial court's findings.

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., ... U.S. ....., 50 U.S.L.W. 4592, 4595 (1982) (footnote omitted). While there is evidence indicating that some hospitals and physicians became Medtronic customers only after the appellants joined Medtronic, there also is evidence indicating otherwise. *See* Rebuttal Testimony of Raich. We are not in the position of substituting our own judgment of the evidence for that of the district court's. The record contains conflicting evidence on the "long-term, near permanent clientele" issue and the district court reasonably credited evidence adverse to the appellants. We are not left with a "definite and firm conviction that a mistake has been committed" and must, therefore, conclude that the district court's finding is not clearly erroneous.

In this same regard, the appellants challenge the district court's finding that physicians are Medtronic customers. The record amply supports this conclusion inasmuch as the physicians were the "real" purchasers of the pacemakers even though the formal sale was made, in most cases, to the hospital. The district court correctly focused upon the substance of the sales transactions and not their form. Appellants cannot seriously dispute the fact that it is primarily the physician who influences and even decides which pacemaker from which manufacturer will be purchased by the hospital. Not only is this finding not clearly erroneous, but it is

correct. This conclusion is also supported by the decision in *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085, 1094 n.3 (D. Minn. 1981), wherein the court stated:

> The ultimate consumer of pacemakers are cardiac patients, not hospitals or doctors. But the pacemakers are sold by the manufacturers to the hospital where the patient is being treated. The hospital purchases pacemakers on recommendations from a physician or other medical personnel treating a patient. Medtronic's sales effort focuses on the physicians and medical personnel. Thus, the term "customers" must include not only the hospital, which actually pays for the product, but also the physicians and surgeons who recommend which product to purchase.

One last point needs to be addressed. Defendants suggest in their briefs that a "long-term, near permanent clientele" cannot be found to exist unless there is present an exclusive relationship. They argue that inasmuch as hospitals and physicians who were Medtronic customers were free to purchase pacemakers from other manufacturers and did so in some cases, they could not be considered long-term nor permanent. We must reject this argument based upon the authority of *Morrison Metalweld Process Corp. v. Valent*, 97 Ill. App. 3d 373, 422 N.E.2d 1034, 1037-38 (1981). There is no support for the narrow interpretation asserted by the defendants. Exclusivity is simply not required.

For the reasons articulated by the district court as well as those just discussed, we hold that the record in this case sufficiently supports the district court's finding of a legitimate and protectible employer interest.

II.

The second argument raised by the defendants is that the restrictive covenant is not reasonable in scope in that it contains no geographical limits. They also argue that the injunctive relief ordered by the district court fails to adequately specify what conduct is prohibited and what conduct is not. Furthermore, they contend

that the district court's order encompasses conduct which the covenant is not intended to prohibit.

Appellants are correct in stating that the covenant and the district court's order contain no geographical limitations. However, this is not fatal in the business context in which this covenant arises. Where the covenant's restriction relates to the solicitation of customers, the absence of a geographical limitation is not unreasonable. The decisions of the Illinois Appellate Courts in *Donald McElroy, Inc. v. Delaney*, 72 Ill. App. 3d 285, 389 N.E.2d 1300, 1307-08 (1979) and *Wolf & Co. v. Waldron*, 51 Ill. App. 3d 239, 366 N.E.2d 603 (1977), are squarely on point. The one year limitation, in light of the amount of time needed to adequately retrain another salesperson, is also reasonable to protect Medtronic's interest.

The vagueness and overbreadth arguments can for practical purposes be merged in this case. It would be impossible for any court to identify every conceivable act that would be covered by the restrictive covenant. All that is required under Fed. R. Civ. P. 65(d) is for the language of the injunction to be as specific as possible under the totality of the circumstances, such that a reasonable person could understand what conduct is proscribed. *City of Mishawaka v. American Electric Power Company, Inc.*, 616 F.2d 976, 991 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). We believe the district court has satisfied this requirement. A plain reading of the injunction reveals that any contacts associated to any degree with the possible sale of pacemakers, with either hospital officials or physicians with whom the appellants had contact in the year prior to their leaving Medtronic, are prohibited. On pages 16 and 17 of its decision, the district court elaborates on the prohibition by identifying several specific acts which are covered. This elaboration helps to clarify the boundaries of the injunction. We believe the injunction is as specifically and clearly framed as possible in light of the commercial environment in which it arises and is being applied. The appellants are placed on adequate notice regarding permissible and impermissible conduct. They are, of

course, always free to seek a more detailed statement if they so choose. *See American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 171 (2d Cir. 1978). But it is our conclusion that the language of the injunction is sufficiently definite and specific to guide the appellants in their business affairs and to apprise them of the injunction's scope and to safeguard the interests of all parties. Their claim to the contrary is really an unsuccessful attempt to subvert the covenant's prohibitions which are reasonable and enforceable in this case.

III.

The last argument made by the appellants is based upon public policy considerations. They claim that public health and welfare are seriously endangered by the limitations placed upon their business activities, thereby rendering the restrictive covenant unreasonable. There is evidence in the record which tends to support appellants' factual assertion that hospitals and physicians who otherwise would seek assistance from the appellants would consider it a loss not to be able to continue to seek assistance from the appellants. But we cannot accept appellants' proposition that this evidence establishes that the public interest is significantly harmed as a result. There is nothing to indicate that the quality of medical care would suffer by enforcement of the restrictive covenant. This same argument was made and rejected in *Medtronic, supra*, 527 F. Supp. at 1095. The reasoning of the district court there is equally applicable to this case.

> Gibbons argues that the public interest of making sure that all patients receive the best medical care available would be seriously hampered by restraining Gibbons. He would be limited in assisting doctors in implantations of pacemakers and from giving seminars to nurses and other hospital personnel. Although Gibbons does perform some beneficial public services by taking part in surgeries and giving seminars, he is primarily a salesman, not a doctor or an educator. His activities contribute to

improving the quality of health care, but his temporary absence from a portion of his sales area would not seriously deteriorate the quality of health care in that area. In addition, Gibbons argues that restraining him may tend to reduce the competition for biomedical devices in his sales area. However, there is substantial competition in the pacemaker industry, and Pacesetter has only a minor portion of the market for pacemakers in northern California. Restraining Gibbons in the limited way available under the restrictive covenant would not seriously affect the competition in the industry. The public interest only slightly favors Gibbons, and is not nearly strong enough to prevent issuance of an injunction in view of the strength of the other three prongs of the *Dataphase* test.

While the appellants have played some role in the disbursement of medical care, the record shows that their impact is simply not as significant and essential as they would have the court believe. They are not an indispensable element whose absence will result in immediate and dangerous consequences. The pacemakers which they sell can still be sold to anyone their new employer chooses to contact, including Medtronic's customers. The only restriction is that they cannot do the selling. And while their personal services may be desired and helpful, there is no evidence indicating that services of equal quality and quantity are unavailable. Furthermore, the restriction is effective for only one year. Under these circumstances, we cannot agree that the public interest suffers from enforcement of the restrictive covenant.

The identical argument was made in *Canfield v. Spear*, 44 Ill. 2d 49, 254 N.E.2d 433, 435 (1969), with the employee there being a physician. The court stated:

> Nor is the contract injurious to any legitimate interest of the public. Defendant can be as useful to the public at some other place in the State as he can in Rockford, and the health of persons elsewhere is just as important. It cannot be said that the public interest is adversely affected if a physi-

> cian decides to move from one community to another, nor does it become so if the move results from some agreement made in advance. If a severe shortage exists in any particular place young doctors will tend to move there, thus alleviating the shortage.

These considerations are equally applicable here. Appellants seem to believe that all of their business activities are prohibited. That is simply not true. There is nothing to indicate that needs previously served by the appellants cannot be served by others or that there is a shortage of salespersons possessing the skills and abilities of the appellants. Only the appellants' interests are implicated by enforcement of the restrictive covenant, not the public's. They voluntarily contracted for the obligations they now must fulfill and the district court has given full and proper effect to those obligations.[1]

IV.

Appellants Benda and Conde filed jury demands with the district court in this case. The requests were denied and only Benda appeals from that decision. We find no merit in his argument and adopt the district court's November 9, 1981 decision in its entirety (Appendix B). We only add that the district court did not, contrary to Benda's apparent impression, deny him a jury trial on his federal antitrust claim. The manner in which the district court handled these cases was reasonable and proper.

For all these reasons, the judgment of the district court is AFFIRMED.

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[1] Upon joining Intermedics, the appellants signed employment contracts which contained restrictive covenants very similar to those contained in their Medtronic employment contracts. It is somewhat puzzling why they would sign such agreements if they seriously disputed the necessity and enforceability of the clauses.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MEDTRONIC, INC., *Plaintiff,* -*vs*- CHARLES F. BENDA, *Defendant.*	No. 81 C 5029
MEDTRONIC, INC., *Plaintiff,* -*vs*- EMIL CONDE, *Defendant.*	No. 81 C 5030
METRONIC, INC., *Plaintiff,* -*vs*- WILLIAM C. CAIN, *Defendant.*	No. 81 C 5051 (Consolidated)

MEMORANDUM OPINION AND ORDER

Plaintiff, Medtronic, Inc. ("Medtronic"), brought separate diversity actions for declaratory and injunctive relief against three of its former employees, Charles F. Benda, Jr. ("Benda"), Emil Conde ("Conde"), and William C. Cain ("Cain"), to enforce certain noncompetition agreements which the three had signed while employed by Medtronic. On September 4, 1981, temporary restraining orders were entered against Benda and Conde, which orders have since expired. On September 8, 1981, the actions against all three defendants were consolidated for discovery purposes, and on September 24, 1981, they were consolidated for all purposes, including trial. Trial was held from November 9 through November 16, 1981. During the course of the trial, the court entered an order restraining the defendants from violating the non-competition agreements pending the outcome of the trial, which order has continued to be in effect to the date of this opinion, except as modified by an order of the Seventh Circuit Court of Appeals, dated January 21, 1982. This court has reviewed the transcript of the trial as well as the relevant exhibits, and hereby enters the following findings of fact and conclusions of law.

I. *Findings of Fact*

Medtronic is a Minnesota corporation with its principal office and manufacturing facilities located in Minneapolis, Minnesota. Medtronic is engaged, *inter alia*, in the manufacture and sale of implantable cardiac pacemakers (hereinafter "pacemakers") and related devices and equipment. The defendants, Benda, Conde and Cain, are all former sales representatives for Medtronic. Benda became a Medtronic employee on April 11, 1977. Benda is a college graduate, and had several years of sales experience prior to joining Medtronic. Conde became a Medtronic sales representative on or about August 1, 1977. Conde had previously attended college for two years and, like Benda, had several years of medical sales experience before his association with Medtronic. Cain joined Medtronic on September 1, 1977. Cain is

also college educated, and he, too, had worked as a sales representative prior to joining Medtronic. None of the defendants was hired for a specific term of employment. All were employed at will.

Subsequent to being hired by Medtronic, each of the defendants was assigned a specific geographic territory within the greater Chicago metropolitan area (extending into Indiana in the case of defendant Conde). All three were then given extensive videotape and classroom training in the sciences and sales. Medtronic supplemented this training with self-directed study materials, and also with additional training in the field, where the salesmen were coached in sales technique, and also attended the surgical implantations of pacemakers, as it was a common practice for Medtronic salesmen to attend such surgeries. All of the defendants were trained by Medtronic to be skilled sales professionals, not merely "order takers." The initial training period for a Medtronic sales representative, although not susceptible of precise definition, was between one and six months.

As sales representatives for Medtronic, the defendants were responsible for persuading physicians and surgeons in their respective territories to prescribe and implant Medtronic pacemakers in their patients.[1] To effect that objective, the salesmen provided physicians with a wide range of services outside of the actual "sale" of the pacemaker. For instance, the defendants often counselled doctors regarding the selection of pacemakers for particular patients, and actually attended the surgical implantation of pacemakers, often on short notice, in order to provide physicians with continuing technical assistance. The defendants also arranged new product demonstrations for doctors and hospitals in their respective territories, and sometimes arranged to

[1] Although pacemakers are usually purchased by hospitals, not doctors, the prescribing physicians and surgeons are the individuals who effectively choose which brand to implant. Therefore, they are the primary focus of the salesman's attention.

fly physicians to Minnesota to tour Medtronic's manufacturing facilities. In addition, the defendants often entertained doctors and hospital staff members, at Medtronic's expense. Pacemakers sales, as practiced by Medtronic, were characterized by close personal and professional relationships between the pacemaker sales representative and the prescribing physicians and surgeons.

When each of the defendants joined Medtronic, he executed an employment agreement (hereinafter the "old agreement"), which contained a restriction of competition with Medtronic at the conclusion of his employment. The restriction provided:

> "For 360 days after my employment, I will not attempt to divert any Company business by influencing customers with whom I or my subordinates were connected [during] the last year of my employment."

Late in September, 1977, each of the defendants signed a revised employment agreement (the "revised agreement"), which contained, among other things, a revised restriction on post-termination competition. In relevant part, the revised agreement provided:

> "In consideration of my employment, continued employment, promotion or increase in compensation by the Company, I hereby agree as follows:
>
> . . . .
>
> 5(b).
> "For 360 days after termination of my employment with the Company, I will not attempt to divert any Company business by soliciting, contacting or communicating with any customers for the Company's products with whom I, or employees under my supervision, had contact during the year preceding termination of my employment"

Benda signed the revised agreement on September 23, 1977, Conde on September 29, 1977, and Cain on September 27, 1977. Each of the revised agreements was also signed by David Raich, the Chicago District Man-

ager for Medtronic (and the defendants' immediate superior), and Dale Olseth, Medtronic's president and chief executive officer.

In return for signing the revised agreement, each of the defendants continued to be employed by Medtronic. At the time the defendants signed, Medtronic also changed its method of compensating its salesmen, replacing a "quota" method with an "eight quarter rolling average method" or "EQRA." That change resulted in increased compensation for each of the defendants. The change in compensation, although announced in late September, 1977, was made retroactive to August 1, 1977.[2]

Benda resigned from Medtronic on August 31, 1981, Conde resigned on September 2, 1981, and Cain resigned on September 4, 1981. All three defendants are now independent pacemaker sales representatives for Intermedics, Inc., a competitor of Medtronic.[3]

Each of the defendants accepted an identical compensation package from Intermedics, consisting of a "salary support" program of up to two years duration, followed by commission compensation equal to 15% of Intermedics' gross sales in his assigned Intermedics territory. The salary support program consists of:

> Two years' guaranteed salary of $100,000 per year;
>
> Reimbursement of all business-related expenses, plus a monthly car allowance of $600;
>
> A $5,000 bonus for the sale of the first ten Intermedic's pacemakers in each defendant's "territory;"

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[2] Because of the retroactivity of the change in compensation, Cain and Conde were actually never compensated under the quota method, although they were employed while that method was in effect.

[3] To be precise, defendant Benda is now employed by Cardio Care Systems, Inc., a corporation which he created just after he left Medtronic. Cardio Care is an independent contractor for Intermedics.

Reimbursement of all legal fees incurred in litigation with Medtronic.

Intermedics has assigned the defendants both temporary and permanent territories. Each defendant's permanent territory consists largely of the hospitals which were in his former Medtronic territory, and each defendant's temporary territory consists only of hospitals outside of his former Medtronic territory. Each defendant agreed to work in his temporary territory until 360 days had elapsed following his resignation from Medtronic, or until such time as a court ruled that he may reenter his former territory. Benda's temporary territory consists largely of Cain's former Medtronic territory, Cain's temporary territory consists mainly of Conde's former Medtronic territory, and Conde's temporary territory consists mainly of Benda's former Medtronic territory.

Notwithstanding the fact that none of the defendants' temporary Intermedics' territories requires that he reenter his former Medtronic territory, since resigning from Medtronic all three of the defendants have had numerous contacts with hospitals and doctors from their former Medtronic territories. Benda's contacts include: (1) the sale of Intermedics pacemakers to doctors whom he had formerly contacted for Medtronic; (2) attendance at surgeries performed in his former Medtronic territory at which Intermedics pacemakers were implanted; and (3) personally introducing defendant Conde to some of the individuals upon whom Conde would be calling as the temporary Intermedic salesman in Benda's territory. Conde's contacts in his former Medtronic territory consist primarily of visits, lunches and dinners with various doctors whom he had contacted for Medtronic. On most of those occasions, Code [sic] discussed the qualifications of defendant Cain, who was the temporary Intermedics salesman in Conde's territory. Conde did not sell the doctors Intermedics pacemakers, however, and there was no evidence that he has attended surgeries in his former Medtronic territory since resigning. Defendant Cain's contacts with his former Medtronic territory have been extensive. They include: (1) dropping off his

new Intermedics business cards at at least nine of the hospitals in his former Medtronic territory; (2) the sale of Intermedics pacemakers to doctors whom he had formerly contacted as a Medtronic employee; (3) attendance at surgeries performed in his former Medtronic territory at which Intermedics pacemakers were implanted; and (4) arranging Intermedics product demonstrations in his former Medtronic territory.

As a result of the above contacts and communications, the court finds that Medtronic has been injured, although the extent of the harm is not susceptible of quantification. During September and October, 1981, Medtronic experienced a drop in sales in its Chicago District office of nearly 100 pacemakers. Pacemakers cost an average of $3,500 apiece. The court concludes that at least a portion of Medtronic's loss is attributable to the defendants' actions.

II. *Conclusions of Law*

The two central issues in this case are the enforceability of the non-competition clause contained in the revised employment agreement and, if the clause is found to be enforceable, the interpretation of certain language contained in that provision. First, the court will address the issue of enforceability.

A. *Enforceability of the Non-Competition Agreement*

Under Illinois law, a restrictive covenant in an employment contract is enforceable where the employer demonstrates the existence of: (1) a valid, binding, contract; (2) a protectible interest in the enforcement of the covenant which justifies its enforcement; and (3) reasonable limitations on the scope of the covenant. *E.g., Gorman Publishing Co. v. Stillman*, 516 F.Supp. 98, 104 (N.D.Ill. 1981). *See Cockerill v. Wilson*, 51 Ill.2d 179 (1972); *Canfield v. Spear*, 44 Ill.2d 49 (1969); *Morrison Metalweld Process Corp. v. Valent*, 97 Ill. App.3d 373, 376 (1st Dist. 1981). Here, the defendants have challenged Medtronic's non-compete clause on all three grounds.

1. *The existence of a valid contract*

All three of the defendants signed employment agreements containing restrictive covenants when they joined Medtronic in 1977 (the "old agreement"), and signed revised agreements containing similar post-termination restrictions late in September of that year. The defendants were all experienced salesmen at the time that they signed those agreements, and they were educated individuals as well. It cannot be said that they either lacked contractual capacity or were unable to comprehend the meaning of the restrictions on competition to which they agreed.

The defendants have argued that the revised agreement should be found void for lack of consideration. The court cannot agree. The revised agreement was supported by two alternatively sufficient bases for consideration. First, Medtronic changed its compensation scheme to the EQRA at the time that the defendants signed the agreement, thereby increasing the salary of each. An increase in pay is certainly sufficient consideration to support a modification of an employment agreement. Although defendant Conde argues that the EQRA was changed in May of 1981, and that therefore, Medtronic's consideration for the revised agreement has been withdrawn, he has failed to demonstrate a return to the quota system which preceded the EQRA, or that his own level of pay has returned to what it would have been under the old system. A mere revision in Medtronic's compensation scheme, which is all that Conde has demonstrated, does not, in itself, render the revised agreement unenforceable.

In addition to compensation increases, in this case continued employment of the defendants by Medtronic was sufficient consideration to render the revised agreement enforceable. *See Carter v. Kaskaskia Community Action Agency*, 24 Ill.App.3d 1056, 1059 (5th Dist. 1974). Where, as here, employment is at will, and the employees agreed to the restrictions when they began their employment, the court finds that their continued employment is sufficient consideration for a revision in the terms of the restriction. *Id. See Reed, Roberts Associates,*

Inc. v. Bailenson, 537 S.W.2d 238, 240, 241 (Mo. App. 1976); *Farm Bureau Service Co. v. Kohls*, 203 N.W.2d 209 (Iowa 1972); *Wrentham Co. v. Cann*, 189 N.E.2d 559 (1963). *But see George W. Kistler, Inc. v. O'Brien*, 347 A.2d 311 (Fa. 1975); *James C. Greene Co. v. Kelley*, 261 N.C. 1966 (1964).[4] In this case, each of the defendants signed an agreement which explicitly stated, "In consideration of . . . my continued employment, . . . I agree as follows . . ." The court finds that the agreements were, as the employees agreed at the time, supported by consideration.

The last of the defendants' challenges to the validity of the revised agreement is that the agreement was an adhesion contract, and that the defendants signed the contract under the duress of either signing or losing their employment. Neither of the arguments is persuasive. True, the Medtronic employment agreements were prepared by Medtronic. That fact alone, however, provides no evidence of the gross disparities in bargaining power which typify most adhesion contracts. *See United States Trotting Association v. Chicago Downs Association*, 487 F.Supp. 1008 (N.D.Ill. 1980). The defendants signed the old agreement at a time at which Medtronic

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[4] The issue of consideration is discussed at length in *Reed, Roberts*. There, the defendant employee challenged the validity of a revised non-competition agreement as lacking sufficient consideration. There, as here, the defendant's employment was at will, and he had signed an original non-competition agreement when he began his employment. The court found that the revised agreement was supported by the consideration of the defendant's continued employment:

> "[T]he continuance by the employer of the employment where continuance is not required supplies adequate consideration for a secondary contract [such as the revised non-competition agreement]. . . .
>
> "Here, we are not considering a contract of employment for a definite term where a party brings about a modification during the term without any consideration. The prior contracts between plaintiff and defendant could be terminated by either party. As found by the trial court, the . . . contract upon which the suit was brought was based upon the consideration of continued employment."

needed additional salesmen, and the defendants were seeking employment. Based on the evidence presented, the defendants simply chose to accept Medtronic's terms of employment. There is no evidence that any was coerced to do so. Regarding the revised agreement, there is no evidence that any of the defendants disagreed with its terms when it was presented to them in late September, 1977, or that Medtronic was, at that time, capitalizing upon any disparity in bargaining power. Indeed, there is little if any substantive difference between the non-competition clauses in the two agreements. No evidence was presented to suggest that any of the defendants sought modification of any of the terms of the revised agreement, or that they even questioned the meaning of the new non-competition clause. The defendants' entire argument seems to be predicated upon Medtronic's insistence that continued employment was contingent upon their signing the revised agreement, but in doing so, the defendants mistake consideration for coercion. Courts have consistently enforced revised employment agreements which were conditioned upon continued employment. *See, e.g., Reed, Roberts, supra.* When the terms of employment at will are revised, an employee must decide whether to accept the new terms or seek alternative employment. Continued employment under the old terms may simply not be one of the options available to the employee, and the fact that it is not one of the options available does not make the employee's decision the product of coercion. The court concludes that the defenses of duress and adhesion fail, and that both the old agreements and the revised agreements signed by each of the defendants were valid contracts.

2. *The existence of a protectible employer interest*

Under Illinois law, a post-termination non-competition clause is not enforceable "unless the employer can demonstrate that a 'protectible interest' justifies it . . ." *Gorman Publishing Co. v. Stillman*, 516 F.Supp. at 104. Two such protectible interests are generally recognized. First, if the employee "acquired confidential informa-

tion through his employment and subsequently attempted to use it for his own benefit," courts will allow the employer to protect his interest in that information. *Morrison Metalweld*, 97 Ill.App.3d at 376. Second, courts will allow an employer to protect his interest in its customers if, by the nature of the business, the employer has "a long-standing relationship with its customers, with whom the defendant would not have come in contact" but for his association with the plaintiff. *Id. See Cockerill v. Wilson, supra*; *Canfield v. Spear, supra*; *Donald McElroy, Inc. v. Delaney*, 72 Ill.App.3d 285 (1st Dist. 1979); *Wessel Co. v. Busa*, 28 Ill.App.3d 686, 692 (1st Dist. 1975). *Cf., Nationwide Advertising Service, Inc. v. Kolar*, 14 Ill.App.3d 522 (1st Dist. 1973) (no protectible interest in customers where relationship is merely transitory). Although this case presented a very close question as to the first type of protectible interest, whether the defendants possessed the requisite confidential information to justify enforcement of the agreement, the court finds that Medtronic's long term relationships with its customers bring it within the meaning of the second type of protectible interest, and therefore, the court need not address the confidentiality issue.

Medtronic's close professional relationships with its hospital accounts, prescribing physicians and implanting surgeons predates the defendants' employment with Medtronic. The defendants, none of whom sold pacemakers prior to joining Medtronic, received extensive training from the plaintiff, and were well-compensated by the plaintiff to further develop close personal and professional relationships with the doctors upon whom they called. The defendants, in developing those relationships "exceeded traditional boundaries of salesman responsibilities." *Wessel Co. v. Busa*, 28 Ill.App.3d at 692. Medtronic's salesmen played an integral role in the entire pacemaker implantation process, from sale through post-implanatation [sic] follow-up. Medtronic salesmen, among other things, attended surgeries and provided continuing technical assistance to the doctors upon whom they called. To further cement the close customer relationships, Medtronic periodically flew physicians to Minnesota to tour its facilities, and also paid the expenses for

its salesmen to wine and dine physicians and members of hospital staffs. As such, the relationships are more closely analogous to the near-permanent relationships described in *Morrison Metalweld, Cockerill* and *Canfield*, then they are to the transitory nature of many other unprotectible customer relationships. Therefore, the court finds a protectible interest to exist here which would justify enforcement of the agreement, thus satisfying the second requirement for enforcement.

3. *The existence of reasonable limitations on the scope of the covenant*

The final requirement-for [sic] the enforcement of a non-competition agreement is that the agreement be reasonable in scope as to both time and geography. *Briggs v. R. R. Donnelley & Sons., Inc.*, [sic] 589 F.2d 39, 41 (1st Cir. 1978) (applying Illinois law). The non-competition agreement here is reasonable as to both. First, the agreement only restricts the defendants' conduct for 360 days following their resignations from Medtronic. Given the length of time needed to replace an experienced employee and the shortness of the restriction, the court finds the time restraint to be reasonable. *See Cockerill, supra* (5-year restriction upheld); *Canfield, supra* (3-year restriction upheld).

Second, the court finds the geographic restraint contained in the agreement to be reasonable and tailored specifically to the interest which Medtronic seeks to protect. Medtronic's agreement restricts only contacts with those customers with whom each of the individual defendants dealt, and not all of the customers of Medtronic as a whole. Furthermore, the restriction does not foreclose the defendants from selling pacemakers in the Chicago metropolitan area, so long as they do not contact customers with whom they previously dealt. The narrowness of that limit has enabled the defendants to secure territories with Intermedics which do not even require them to relocate from their present residences. The restriction at bar is reasonable as to time and geography and is not unduly burdensome to the defendants. *See Gorman Publishing Co. v. Stillman*, [*supra*].

The court concludes, after reviewing the non-competition agreements here, that they are reasonable and should be enforced. The Illinois Appellate Court in *Morrison Metalweld* observed, "[w]hen a party to an employment contract agrees, in exchange for certain benefits, to refrain from competing with his or her employer, that agreement should be enforced where equitable." 97 Ill.App.3d at 376. Here, it seems only equitable that Medtronic should have the right for which it contracted, to replace the defendants in its close doctor-salesman relationships before the defendants have the opportunity to appropriate those relationships for their own private gain.

B. *Interpretation of the agreement*

Having decided that the restrictive covenant is enforceable, the court is next required to interpret the terms of the agreement. The defendants contend that the use of the word "customer" in the agreement means that they should only be restrained from contacting hospitals, and that they should be left free to contact doctors with whom they dealt as Medtronic employees. According to their argument, hospitals are the ones who actually order the pacemakers, and are therefore the salesmen's customers within the common meaning of that term. The court rejects that argument. While it is true that hospitals may be responsible for the actual ordering of pacemakers, the real "customers" in the pacemaker industry are the physicians who prescribe them. In the pacemaker business, the salesman's attentions are usually focused upon the physician, the individual whom the salesman counsels in making certain pacemaker selection decisions, whom the salesman assists in the operating room, and whom the salesman wines and dines. He or she is clearly the saleman's customer.

The defendants have suggested that regardless of the meaning of the word customer in the pacemaker industry, the plaintiff, which drafted the agreement, failed to define the word for the defendants, and therefore, the word should be defined according to its ordinary meaning, and construed against the drafter. The court rejects

that argument. At the time that the defendants signed the revised agreements, the court concludes that all of them knew that the term customer included physicians. Second, the court finds that in the context of sales in general, the term "customer" is broad enough to include generally the class of individuals upon whom a salesman calls in effecting his sales, regardless of which of those individuals actually places the order. The defendants were all experienced salesmen when they signed their first employment contracts with Medtronic. Certainly, Medtronic told them upon whom they would be calling for their new employer. The court can only conclude that the defendants understood the restriction on contacts to include physicians. The definition of customer suggested by the defendants is simply too narrow to be accepted.

The sole remaining question of interpretation concerns the following language in the agreement: "I will not *attempt to divert* any Company business *by* soliciting, contacting or communicating . . ." (emphasis added). By its terms, the agreement only prohibits attempts to divert, and not all communication with former customers of the defendants. While it is difficult to ascribe a precise meaning to the phrase "attempt to divert," the court concludes, based on all of the evidence, that the following conduct constituted impermissible attempts to divert which violated the non-competition agreement:

1. The distribution of Intermedics business cards by Cain in his former Medtronic territory;
2. Sales of Intermedics pacemakers by Benda and Cain to doctors or hospitals whom they had contacted in their last year with Medtronic, regardless of whether the hospitals at which the implantations were performed were located within their former Medtronic territories;
3. Attendance at surgeries in their former territories at which Intermedics pacemakers were implanted by Benda and Cain;
4. Benda's personal introduction of Conde to various individuals with whom Benda dealt in his last year with Medtronic;

5. Cain's arrangement of a product demonstration in his former Medtronic territory;

6. Conde's lunch and dinners with doctors whom he had contacted during his last year with Medtronic violated the non-competition agreement as follows:

   a. Any meals which were paid for by Intermedics are conclusively presumed to have been for the purpose of diverting business, whether in the long term or short term;

   b. Any discussion of the qualifications of either of Conde's co-defendants, who would be serving the doctor or hospital temporarily, constitutes attempts to divert business.

The above list of impermissible attempts to divert business is not exhaustive. While the court will not speculate as to hypothetical cases or prejudge whether or not certain activities might be found to be violative of the agreement, nevertheless, it should be noted that neither subtle nor explicit attempts to divert business are permitted under the agreement. Contact of a former customer, even to sell nonpacemaker products, may be construed as an attempt to divert business where the defendants' new employer sells directly competing pacemakers. Also, contact need not be initiated by one of the defendants in order to constitute an attempt to divert business. An attempt to divert business may consist of merely responding to a physician's request for information or assistance. To protect the public interest, medical emergencies, of course, are excluded from that proscription.

Non-competition agreements such as the one at issue here do not violate the First Amendment rights of the restricted parties, but are designed only to achieve the restriction of certain commercial speech for which the parties themselves had contracted. The court does not hold that the defendants may not communicate. Rather, it holds only that each of the defendants may not attempt to divert business from the plaintiff. Communication, per se, is restricted only insofar as it would vio-

late the non-competition agreement agreed to by the parties.

C. *Claims for additional relief*

1. *Tortious conduct*

In addition to its request for injunctive and declaratory relief on its contract claim, the plaintiff introduced certain evidence at trial which it now claims supports a finding of tortious conduct on the part of the defendants, although no such claim was stated in the complaint. As relief for the alleged tortious conduct, the plaintiff seeks to restrain each of the defendants from contacting his former Medtronic customers for one additional year beyond the 360 days provided for in the non-competition agreement. The plaintiff seeks also to amend its complaint to conform with the evidence presented at trial. The court denies the plaintiff's requests for several reasons.

First, at the time that this court consolidated these cases, and at the time that the defendants conducted discovery and otherwise prepared for trial, these cases were represented to be three virtually identical breach of contract cases. The court finds that the defendants would be unduly prejudiced by any attempt to transform those cases at this time into three very dissimilar tort actions. Second, the additional relief which the plaintiff requests is effectively directed against Intermedics, Inc., which has never been made a party to this action. Any such attempt to punish a non-party to this action seems to the court to be inappropriate, regardless of the interest which the non-party may have in the proceedings. Finally, to the extent that any such tortious conduct could be proven, there has been no attempt made to prove that there has been any injury as a result of the tortious conduct per se, as distinguished from the injury caused by the breach of contract alone. In all, the court finds that the parties did not consent to the trial of Medtronic's tort claims pursuant to Fed.R.Civ.P. 15(b), and that justice requires that the plaintiff's request to amend its complaint pursuant to Fed.R.Civ.P. 15(a) or 15(d) be denied.

2. *Restrictions based upon mutual agency*

The plaintiff's final request for additional relief suggests that because of the defendants' close relationships among themselves, their rotation of former Medtronic territories to serve as temporary Intermedics territories, and their habit of covering each other's surgeries, each defendant should be enjoined from entering the former Medtronic territory of either of his co-defendants for the remainder of the 360-day non-competition period. The court rejects the plaintiff's argument.

The court recognizes that attempts to circumvent restrictive covenants may, in some cases, justify restraints on non-parties to the covenants. *See Arwell Division of Orkin Exterminating Co. v. Kendrick*, 131 Ill.App.2d 632 (3d Dist. 1971) (wife held to be bound by husband's non-competition agreement). Nevertheless, the court cannot find that the defendants here were so identified with each other as to be considered each other's agents or alter egos, and will not restrict them from each other's former Medtronic territories. Of course, none of the defendants is free to reenter his own former territory for the purpose of introducing one of his codefendants to potential customers, and the defendants are not free, under the terms of the non-competition agreement, to impart to each other any confidential information they might possess regarding particular contacts within their former Medtronic territories. Any such contacts or information would represent an impermissible attempt to appropriate Medtronic's protectible customer relationships discussed above. *See Donald McElroy, Inc. v. Delaney*, 72 Ill.App.3d at 291-2.

III. *Conclusion*

For all of the reasons stated above, the court concludes that clause 5(b) of the revised employment agreements entered into between Medtronic and each of the three defendants is valid and enforceable for 360 days following each defendant's resignation from Medtronic. The agreement is enforceable against Benda until August 25, 1982, against Conde until August 27, 1982, and

against Cain until August 29, 1982. Until such time as the agreement is no longer enforceable against him, each defendant is ORDERED not to attempt to divert any Medtronic business by soliciting, contacting or communicating with any customers for Medtronic products, including physicians, with whom he, or employees under his control, had contact during the year preceding his resignation from Medtronic. The defendants are particularly ORDERED not to engage in any further conduct or practices in contacting and dealing with their former Medtronic customers as described at pages 16 and 17 of this opinion and found to be in violation of the agreement.

The above findings of fact and conclusions of law represent a final resolution of Medtronic's claim for injunctive and declaratory relief against the three defendants. Those findings and conclusions are entered without prejudice to any additional right of Medtronic to petition the court for appropriate relief and sanctions, including possible contempt citations, against any of the defendants for violations of the non-competition agreement committed during the pendency of any restraining order or temporary injunction of this court, or breach of any additional agreement or representation by the parties that they would not violate section 5(b) during the course of this litigation.

ENTER: BERNARD M. DECKER
United States District Judge

DATED: February 4, 1982.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MEDTRONIC, INC.,	)	
	)	
Plaintiff,	)	
	)	
-*vs*-	)	No. 81 C 5029
	)	(Consolidated)
CHARLES F. BENDA,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Medtronic, Inc., brought civil actions for declaratory and injunctive relief against three of its former employees, Charles F. Benda, Emil Conde and William C. Cain, to enforce the terms of noncompetition agreements which were allegedly in effect at the time that the three resigned from Medtronic's employ in August and September, 1981. The three cases were originally consolidated for discovery purposes, and have since been consolidated by the court for all purposes, including trial. Before the court are defendants Benda and Conde's jury demands as to Medtronic's claim.[1]

Rule 57 of the Federal Rules of Civil Procedure provides that in actions for declaratory judgment pursuant to Title 28, U.S.C. §2201, "the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39 [of the Federal Rules of Civil Procedure.]" Although Benda and Conde have

[1] Defendant Benda, in addition to answering Medtronic's complaint, has filed a counterclaim, and a jury demand as to the counterclaim. This will be discussed separately, later in the court's opinion.

filed timely jury demands, Fed.R.Civ.P. 38(b), the court on its own motion strikes those demands pursuant to Rule 39(a):

> "When trial by jury has been demanded as provided in Rule 38, . . . [t]he trial of all issues so demanded shall be by jury unless . . . the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

The court's decision to strike the demand is compelled by its conclusion that this is an action wholly for equitable relief, and therefore no right to a jury trial exists.

The Seventh Amendment to the United States Constitution provides that in "[s]uits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Of particular relevance here are the words "suits at common law." It is generally recognized that if a case "is a purely equitable one," it is not considered a suit at common law, and "the parties are not entitled to a jury." *Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1189 (3d Cir. 1979) (court held no right to jury trial in action for declaratory relief and specific performance of option clause in commercial lease, where plaintiff sought only equitable relief and no damages). *See Ross v. Bernhard*, 396 U.S. 531, 537-38 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). The sole issue here in determining the defendants' right to a jury trial on Medtronic's claim, then, is whether that claim is wholly an equitable one.

Unlike typical breach of contract actions, this suit is, in essence, an action to declare the continuing validity of a contract, specifically the noncompetition clause in an employment contract. The plaintiff here does not seek damages for breach, but only requests that the court enjoin the defendants from breaching that term. The relief requested is, in essence, specific performance of a restrictive covenant. Such a claim is not a suit at common law. As the Third Circuit noted:

> "An action for specific performance, without a claim for damages is purely equitable and historically has always been tried to the court. *See Klein v. Shell Oil Co.*, 386 F.2d 659 (8th Cir. 1967); 5 Moore's Federal Practice ¶3821 (2d ed. 1979); 9 C. Wright & A. Miller, [Federal Practice and Procedure, Civil,] *supra* §2309."

Owens-Illinois, 610 F.2d at 1189. *See United States v. Snepp*, 456 F. Supp. 176 (E.D.Va. 1978), *aff'd*, 595 F.2d 926 (4th Cir. 1979), *rev'd on other grounds*, 444 U.S. 507 (1980), (jury demand denied in suit for specific performance of employment termination agreement as to plaintiff's claim for injunctive relief).

Defendant Conde has argued that his answer, in which he pleads such defenses as lack of consideration, prior breach by Medtronic, and misrepresentation, raises legal issues, and that he is thereby entitled to a jury trial. Similarly, defendant Benda has asserted defenses of lack of consideration and the unreasonableness of Medtronic's restraint. The court rejects the argument. While the defenses may raise factual issues, they fail to convert Medtronic's action into a legal one. As the Third Circuit pointed out in *Owens-Illinois*, "issues of fact arise in both legal and equitable proceedings," and the existence of factual defenses in an equitable proceeding does not require a jury. 610 F.2d at 1190. The defendant there had argued that the contract he was sued on was unenforceable because of failure of consideration and the plaintiff's prior breach of the contract. The court rejected the defenses as a basis for a jury trial right:

> "To prevail, the plaintiff must establish a valid contract, and the trial will require proof of disputed factual matters and favorable interpretation of law. That, however, does not make plaintiff's claim a 'legal one,' nor do the defendant's denial of facts and assertion of contrary construction of contract language amount to 'legal claims.'"

610 F.2d at 1190. The court here finds *Owens-Illinois* persuasive, and therefore denies the jury demands as to Medtronic's claim.

The Benda Counterclaim

Subsequent to this court's consolidation of these three cases, first for purposes of discovery, and then for all purposes, defendant Benda filed a counterclaim alleging that (1) Medtronic wrongfully obtained a temporary restraining order to enforce the noncompetition agreement; (2) Medtronic committed an unlawful restraint of trade by consistently enforcing the noncompetition agreement and otherwise restricting its salesmen; and (3) Medtronic, by certain business practices unrelated to the noncompetition agreement, has breached its agreement with Benda and otherwise injured him. This counterclaim was timely filed, although it should be noted that it was filed subsequent to the court's decision to consolidate the three cases for trial, and also subsequent to the dismissal of Medtronic's claim against Benda (and the later reinstatement of that claim when the parties were apparently unable to effectuate an acceptable settlement agreement). Neither of the other two defendants has filed a counterclaim. The plaintiff has alleged that none of the counts of the counterclaim state a claim upon which relief can be granted.

Since neither of the other two defendants in this matter has filed a counterclaim, and since a number of the issues raised by Benda's claim are based on facts and circumstances unique to the relationship between Medtronic and Benda,[2] the court finds that severance of Benda's claim from that of Medtronic is appropriate. This especially is true where, as here, the plaintiff has alleged that the defendant has failed to state a claim upon which relief can be granted. Such a severance will be conducive to expedition and economy. Fed.R.Civ.P. 42(b). As the counterclaim will be tried separately, if it

[2] From what the court can determine, Benda is claiming that Medtronic forced him to create a pacemaker market where none was needed. This is the basis for his "prior breach" counterclaim, and also a partial basis for his "restraint of trade" counterclaim. Apparently, these facts are unique to Medtronic's relationship with Benda.

is sustained, Benda's jury demand as to its [sic] counterclaim need not be addressed at this time.

For all of the above reasons, the demand by Conde and Benda to a jury trial of Medtronic's claim for declaratory and injunctive relief is denied.

ENTER: BERNARD M. DECKER
United States District Judge

DATED: November 9, 1981.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 2, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. ROBERT A. GRANT, Senior District Judge*

MEDTRONIC, INC.,

Plaintiff-Appellee,

Nos. 82-1212, 82-1021 vs.

CHARLES F. BENDA, EMIL CONDE and WILLIAM C. CAIN,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 81 C 5051, 81 C 5029 and 81 C 5030.
Bernard M. Decker and George N. Leighton, *Judges.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant William C. Cain, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED, that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

No. 82-920

Supreme Court, U.S.
FILED
JAN17 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. CAIN,

Petitioner,

vs.

MEDTRONIC, INC.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

There are no questions of sufficient significance to require the granting of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

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IN THE

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinions below are accurately described in the petition, except that the Seventh Circuit opinion is reported at 689 F. 2d 645.

STATEMENT OF FACTS

There are numerous places were petitioner's[1] statement of facts becomes difficult to square with the record below. Rather than go through them one by one, whether respondent deems the statement relevant here or not, respondent will make a brief statement of its own.

Petitioner Cain, and two of his fellow sales representatives with Medtronic, all left Medtronic at about the same time to become sales representatives for a major competitor of Medtronic, Intermedics, Inc. Suits were filed and consolidated against the three sales representatives to enforce the identical restrictive covenant clauses in their contracts. The district court entered an injunction enforcing the contracts on February 4, 1982, and the Seventh Circuit Court of Appeals affirmed on July 13, 1982. Requests were made prior to trial and after trial of the district court, and on several occasions to the Seventh Circuit, by petitioner to be permitted to attend surgeries with his old customers when specifically requested by doctors. On all occasions except one (by the Seventh Circuit, for a two week period only and prior to entry of the final injunction by the district court), these requests were denied.[2]

---

[1] The caption refers to "petitioners" but the only petitioner here is Cain. Benda petitioned separately on different issues and Conde has no petition pending.

[2] There is no purpose to such an order other than the diversion of Medtronic business. Petitioner confirms this in that when the Seventh Circuit entered the one temporary order permitting surgery attendance (when it was specifically requested by an old customer-physician), petitioner himself took the initiative to call his old customers and inform them that they had merely to contact him and he would be able to assist at any surgery, emergency or otherwise. And they did so.

Petitioner has conceded in his petition here, contrary to arguments which were made below, that virtually every surgery attended by a sales representative is accompanied by a sale of that sales representative's product. Therefore, the ability to attend a surgery of an old customer-physician is an assurance of an Intermedics product sale. Indeed, of all of the surgery-attendance violations of the restrictive covenants testified to in the district court, all but one involved an Intermedics implant.

This proves the wisdom and purpose of the restrictive covenant clauses. A relationship of trust and confidence is built between a sales representative, extensively trained by Medtronic, as petitioner now concedes, and his physician-customer, to the point where the doctor may switch products merely to continue to deal with the same sales representative. This encourages companies like Intermedics, which does not have extensive training, to buy a market share simply by hiring away Medtronic sales representatives.[3] The restrictive covenant clause, preventing a sales representative from dealing with customers he has dealt with in the prior year, for 360 days, permits Medtronic to replace its old sales representative with a new one, train the new sales representative, and give that sales representative a little breathing space to develop his own relationship with customer-physicians without interference from the prior sales representative. And the clause achieves this equity without preventing the former sales representative from earning his living in the same field and same general geographic area.

Contrary to petitioner's argument, a physician deprived temporarily of the services of petitioner is not deprived of

[3] And there is no risk for the sales representative. Petitioner, Benda and Conde are each guaranteed, for the first two years, an annual salary of $100,000 whether they sell a single pacemaker or not, a car allowance of $600 per month, expenses and a bonus upon the sale of their first 10 pacemakers, in addition to reimbursement for all legal expenses incurred in any litigation with Medtronic.

competent technical help. In addition to hospital technicians, many of whom are qualified to do the kind of measurements a sales representative can do, there are the services of the other two former Medtronic, now Intermedics, sales representatives who left at the same time as petitioner, and who petitioner concedes are in every respect as capable, trained and knowledgeable as petitioner, and who are available on a full time basis. In addition there are skilled sales representatives of Medtronics available as well as those of other manufacturers. Dr. Kehoe, called as a witness by petitioner, specifically refused to say that the quality of patient care would suffer if he did not have a particular sales representative. All he would say is that his life would be "easier" if he were dealing with someone he was used to.

It is true that in October of 1982 Medtronic filed a motion in the district court for leave to file an amended and supplemental complaint. Leave was granted on December 28, 1982 insofar as Medtronic seeks damages for violations of agreements or court orders from the date of filing of the initial complaints to the expiration of the injunctions. The pending contempt proceeding against this petitioner will be subsumed in the damage claim for violations of orders and agreements during the pendency of the effective dates of those orders or agreements.

ARGUMENT

The sole basis for petitioner asking this Court to grant a writ of certiorari under Supreme Court Rule 19, is that the case presents a question of federal law which has not been, but should be, decided by this Court. The sole authority for the finding of a "federal" question is the old Latin adage, *ipse dixit.*

The first question presented, whether it is contrary to public policy to enforce a restrictive covenant clause in a private, commercial contract between an employer and its sales representative, is clearly not a federal question.[4] The clause prohibits the sales representative from diverting business by soliciting, contacting or communicating with customers with whom the sales representative did business in the 360 days preceding his termination of employment. It is not here argued that the restrictive covenant clause is in any respect unreasonable except in that it has the side effect of preventing a sales representative, for 360 days, from assisting former customer-physicians in implant surgeries, each of which, petitioner concedes, would result in a sale of an Intermedics product to that physician, thus completely nullifying any effect the restrictive covenant clause might have.

The second "related" question suggested by petitioner is whether the restriction on the sales representative, because of its indirect effect on the ability of his old customer-physicians to use his services for a limited period of time, raises a constitutional question on behalf of physicians (and therefore their patients), through the back door as it were. Petitioner suggests that the restriction violates a physician's rights under the Fifth and Ninth Amendments to the United States Constitution to administer medical care to his patients in accordance with his best judgment, citing *Doe* v. *Bolton,* 410 U. S. 179 (1973).

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[4] It should be noted here that for public policy reasons medical emergencies were explicitly exempted from the terms of the district court's injunction enforcing the employee agreement.

Roe v. *Wade*, 410 U. S. 113 (1973) and *Doe* v. *Bolton*, *supra*, enforced rights under the Fourteenth Amendment to the United States Constitution against state action infringing those rights. Here there is no state action and no Fourteenth Amendment right.

That a physician's complete freedom to have a particular person as a technician in implant surgery is in some small way restricted does not raise this to a violation of anyone's Fifth or Ninth Amendment rights, even assuming the petitioner has standing to raise the rights of physicians and their patients. Would a union contract with the hospital which had the effect of restricting the availability of nurses or other technical personnel become a federal matter because it left the doctor without complete freedom as to who would be available to him when? Or would his lease of office space become a federal matter because it required the building to be at a particular temperature which the doctor thought not in the best interests of his patients?

Quite apart from the fact that there is no federal question, there is really no great public health issue either. The unavailability of one sales representative will not have an effect on a physician's determination to implant or not to implant, or in dealing with his patient. One's choice of a technical assistant is hardly on the level of the concerns in *Doe* v. *Bolton*, *supra*, or *American Medical Association* v. *Weinberger*, 522 F. 2d 921 (7th Cir. 1975), which involved a challenge to HEW regulations which would require immediate review of a physician's decision to hospitalize a patient. Both of those cases deal with direct restraints on a physician's medical judgments. This is not the case here.

Moreover, contrary to petitioner's claim, his "public health" argument has been routinely rejected by other courts enforcing similar agreements in similar circumstances. In *Medtronic, Inc.* v. *Gibbons*, 527 F. Supp. 1085 (D. Minn. 1981), the district court rejected an identical argument (it is difficult to see how this case is inapplicable merely because the parties

submitted it on pleadings, affidavits and depositions, rather than after a trial). It said:

> Gibbons [the salesman] argues that the public interest of making sure that all patients receive the best medical care available would be seriously hampered by restraining Gibbons. *He would be limited in assisting doctors in implantations of pacemakers* and from giving seminars to nurses and other hospital personnel. Although Gibbons does perform some beneficial public services by taking part in surgeries and giving seminars, he is primarily a salesman, not a doctor or an educator. His activities contribute to improving the quality of health care, but his temporary absence from a portion of his sales area would not seriously deteriorate the quality of health care in that area. 527 F. Supp. at 1095.

Moreover the case law is clear that an otherwise valid employment agreement is enforceable even if its restrictions are directly imposed on doctors themselves. See, *e.g.*, *Canfield* v. *Spear*, 44 Ill. 2d 49, 254 N. E. 2d 433 (1969) (doctor not permitted to practice in 25 mile radius of Rockford for 3 years); *Cockerill* v. *Wilson*, 51 Ill. 2d 179, 281 N. E. 2d 648 (1972) (veterinarian not permitted to practice in 20 mile radius of Rushville for 5 years).

CONCLUSION

The Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals should be denied.

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No. 82-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. CAIN,

Petitioner,

vs.

MEDTRONIC, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF THE PETITIONER

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QUESTIONS PRESENTED

(1) Is it contrary to public policy to enforce a restrictive covenant so as to prohibit a pacemaker salesman from assisting in implant surgery, even though his assistance has been specifically requested by a cardiologist or surgeon?

(2) Does such a prohibition violate a patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it, as guaranteed by the Fifth and Ninth Amendments to the United States Constitution? (*Doe v. Bolton*, 410 U.S. 179, 197 [1973]).

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REPLY BRIEF OF THE PETITIONER

ARGUMENT

I.

A FEDERAL QUESTION IS PRESENTED IN THAT THE ENFORCEMENT OF THE COVENANT VIOLATES THE CONSTITUTIONAL RIGHTS OF PHYSICIANS AND PATIENTS, AND IS CONSEQUENTLY AGAINST PUBLIC POLICY.

The Respondent asserts that whether public policy is violated by the covenant in question does not present a federal question (Response, p. 5). However, whether a restrictive covenant violates public policy is always of paramount concern for a federal court in determining if such a covenant should be enforced by injunctive relief. *Machlett Laboratories, Inc. v. Techny Industries*, 665 F.2d 795, 797 (7th Cir., 1981). Indeed, this is the case whenever an injunction is sought, and particularly when rights involved in the doctor-patient relationship are concerned. See *American Medical Assn. v. Weinberger*, 522 F.2d 921, 925, 926 (7th Cir., 1975). Even the Court of Appeals herein had to weigh this consideration (App. 6a-8a).

It is the Petitioner's contention that the enforcement of the covenant interferes with the constitutional rights of physicians and patients concerning the administering of medical care. If the Petitioner's contention is correct, then, clearly, a federal question is involved. Concomitantly, if the covenant's enforcement violated the constitutional rights of physicians and patients, it seems only logical to conclude that such enforcement also violated public policy. Thus, the key issue presented for review is whether the physicians' and the patients' constitutional rights were violated by the District Court's enforcement of the covenant.

It is established that a physician has a constitutional right to administer medical care to his patient in accordance with his best medical judgment, and that his patient has an accompanying constitutional right to receive such care. *Doe v. Bolton*, 410 U.S. 179, 197 (1973) and *American Medical Assn. v. Weinberger*, 522 F.2d 921, 925 (7th Cir., 1975). The Respondent does not dispute the validity of this proposition. Given this proposition, it follows that if some decision is considered to be part of a physician's administering of medical care that decision belongs to the physician, and is within his constitutionally protected realm.

The issue in this case is whether the physician's selection of a salesman on whom to rely for assistance, before, during, and after implant surgery is within the realm of a medical decision. If it is, it is constitutionally protected and cannot be interfered with by an injunction enforcing a restrictive covenant. For, enforcement of the covenant would violate the constitutional rights of physicians and patients, and, consequently, be contrary to public policy.

It would seem obvious from the testimony in this case that the physician's selection of a salesman for the above tasks is a medical decision, if only from the fact that it is made by the physician himself as part of his patient care. Both Dr. Kehoe and Dr. Carney considered such a selection an important one for a physician to make. Indeed, Dr. Carney termed it a critical part of patient care (Tr. 660). As such, the decision is clearly an exercise of the physician's medical judgment. Thus, it comes within the constitutionally protected area of the physician-patient relationship as enunciated by this Court in *Doe v. Bolton*, *supra*.

The Respondent concedes the validity of the principle, enunciated in *Doe v. Bolton* and *American Medical Assn. v. Weinberger*, that direct restraints on a physician's medical judgments are prohibited. However, the Respondent argues that such "... is not the case here" (Response, p. 6). Yet, here, by virtue of court order a physician is prohibited from consulting with the pacemaker technician he thinks is most qualified to advise him concerning his patients' pacing problems. Furthermore, the physician is prohibited from having the technician, he deems most qualified, assist him in implant surgery. If these are not direct restraints on a physician's medical judgments, then what are?

If the restraints were effected by a federal officer or employee they would clearly be prohibited by the provisions of 42 U.S.C. § 1395 which specifies in relevant part:

> "Nothing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, ..."

Yet, here, a federal judge is doing that which is clearly probibited to other federal employees. This injunction constitutes a direct interference "... with a function and duty traditionally reserved to qualified medical professionals". (See *American Medical Assn. v. Weinberger, supra*, at 925).

In its response, pp. 6, 7, the Respondent cites the following cases in support of its opposition to the petition, *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085 (D. Minn. 1981), *Canfield v. Spear*, 44 Ill. 2d 49, 254 N.E.2d 433 (1969), and *Cockerill v. Wilson*, 51 Ill.2d 179, 281 N.E.2d 648 (1972). Yet, none of these cases dealt with the con-

stitutional and public policy issues raised here.[1] The decision in *Gibbons* has already been discussed in the petition herein at p. 21.

Insofar as *Canfield* and *Cockerill* are concerned it is interesting to note that in each case a doctor was prohibited from establishing his practice within a 20-25 mile radius of the respective cities. Those cases did not prohibit the doctors from continuing to treat their patients outside the prohibited boundaries. Whereas, in this case all business contact between the salesmen and the prohibited doctors was banned, regardless of where it occurred. Unlike the decisions in *Canfield* and *Cockerill*, and those in virtually all other restrictive covenant cases, there were no geographic limits to the covenant.

II.

THE CONSTITUTIONAL RIGHTS INVOLVED HEREIN ARE PROTECTED BY THE FIFTH AND THE NINTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Respondent also notes that this case does not involve any state action and thus no claimed violation of a Fourteenth Amendment right is involved (Response, p. 6). However, the constitutional rights involved in the physician-patient relationship flow from the right to liberty and the right to privacy as guaranteed by the Fifth and the Ninth Amendments to the Constitution. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) and the concurring opinion of Justice Goldberg therein at 486,

[1] *Canfield* and *Cockerill* were decided before this Court's historic decision in *Doe v. Bolton*, *supra*, which discussed at length the constitutional rights involved in the physician-patient relationship.

491, 492; *Roe v. Wade*, 410 U.S. 113, 152, 153 (1973). In *American Medical Assn. v. Weinberger, supra*, at 925 the Court acknowledged that the constitutional rights involved in the physician-patient relationship do not reside solely in the Fourteenth Amendment. The Court there was concerned as to whether those rights would be infringed by proposed H.E.W. regulations. In that case, as here, there was no state action involved.[2]

Finally, the Respondent proposes two extremely vague hypothetical situations, arguing that neither of them would become federal matters (Response, p. 6). In view of their vagueness, it is impossible to tell. But the fact situation here is very concrete, and poses a novel but very real question as to whether federal constitutional rights have been infringed and public policy violated. Also, in view of the high technology nature of the pacemaker industry, this case is a harbinger of those to come.

The union of medicine and high technology is here. The recent implant of an artificial heart into Barney Clark has made that point dramatically. Are restrictive covenants going to be allowed to deprive surgeons of technical assistance they want and need in surgery? Is a pacemaker company's desire to protect its market share to take precedence over a surgeon's desire to provide his

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[2] It should also be noted that the petitioner proposed an additional basis for review by this Court, namely, that the Court of Appeals' decision is based on findings of fact which it made in place of any from the district court (Petition, pp. 19-22). This action by the Court of Appeals violates the Federal Rules of Civil Procedure and the principles enunciated by this Court in a number of decisions (Petition, p. 20). The Respondent did not comment on this argument.

patient with the best technical assistance available?[3] This case presents very important constitutional and public policy issues. A decision by this Court setting forth the constitutional principles applicable in such situations will affect the type of health care provided hundreds of thousands of future pacemaker patients. Furthermore, it could well affect the application of restrictive covenants in other areas of medicine as well.

The Petitioner believes that as a matter of constitutional right and public policy the physician should be free to use the technician he thinks is best qualified to assist him. After all, his patient's life is at stake and he wants to have the best pacemaker technician he knows of assist him in surgery now. It does today's patient no good to have the best technician available to him in twelve months. His heart is malfunctioning now. He needs a pacemaker implant now. And would any patient want less than the best surgeon and the best technician to assist in his implant operation? A patient would not take kindly to the view that a restrictive covenant should be allowed to prevent his doctor from having the best technician available assist in his surgery.

Medtronic has long argued that it must enforce the covenant in order to protect its share of the pacemaker market. However, concerns of far greater import than market share are at work here. As this Court stated in *United States v. Oregon Medical Society*, 343 U.S. 326, 336 (1952), ". . . there are ethical considerations where the historic direct relationship between patient and

---

[3] It seems strange that a pacemaker company should be held to possess a proprietary interest in various physicians so as to interfere in their practice of medicine.

physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters".

The covenant deprives physicians of the right to consult with the pacemaker technician on whom they have come to rely for advice in a complex area. Furthermore, the covenant deprives physicians of the technician they think is best qualified to assist them in implant surgery. As such, the covenant violates a patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it. The covenant is an unconstitutional interference in the practice of medicine. Thus, its enforcement is contrary to public policy.

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APPENDIX A

1. *Dr. Kehoe's Testimony.* In its Response, p. 4, the Respondent states as follows:

> "Dr. Kehoe, called as a witness by petitioner, specifically refused to say that the quality of patient care would suffer if he did not have a particular sales representative. All he would say is that his life would be 'easier' if he were dealing with someone he was used to."

However, a review of the record reveals that Dr. Kehoe was prevented from answering the question by virtue of the Court's interjecting another.

> "Q. (Mr. Valenti) One final question: Do you think that the patient welfare and quality of care that you are able to deliver will suffer if William Cain is prohibited from contacting you within the next 360 days or any portion thereof?
>
> "A. Well, I think—it is difficult for me to answer that but I will say that the—
>
> "THE COURT: You would prefer to have him available, right?
>
> "THE WITNESS: My life would be made a great deal easier if he was available to me and if I didn't really have to resort to communicating or dealing with people in whom I may have a lower level of confidence." (Tr. 547)

Besides, Dr. Kehoe's testimony makes it clear that he thought the quality of medical care was adversely affected by enforcement of the covenant (Tr. 544-547).

Despite Dr. Kehoe's plea the District Judge went ahead and enforced the covenant, thereby making Dr. Kehoe's life a great deal harder. That is why the covenant is wrong. Any covenant which makes a physician's practice

a great deal harder is an unwarranted interference in the practice of medicine and is against public policy.

2. *Medical Emergencies.* In the Respondent's view public policy objections are met by virtue of the fact that medical emergencies were excluded from the district court's proscription (App. 23a and Response, p. 5). However, this provision has proved to be of dubious value. The Petitioner attended three emergency surgeries while the preliminary injunction was in effect and reported them to the Respondent pursuant to the court's direction (Tr. 672). In its March 16, 1982 contempt petition the Respondent charged that the Petitioner's attendance at the three surgeries was in violation of the preliminary injunction (see the Petition herein, p. 12).